Supreme Court, U.S.
FILED

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~~No. 99-3451~~

IN THE

# SUPREME COURT OF THE UNITED STATES

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ROBERTA S. SALMON,
*Petitioner,*

*versus*

WEST CLARK COMMUNITY SCHOOLS,
*Respondent.*

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On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Seventh Circuit

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## PETITION FOR WRIT OF CERTIORARI

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ROBERTA S. SALMON
109 Farrington Drive
New Albany, Indiana 47150
*Pro Se*

WESTERFIELD-BONTE CO., 619 W. KENTUCKY–P.O. BOX 3251, LOUISVILLE, KY.

65 pp

## QUESTIONS PRESENTED FOR REVIEW

A. Whether in an ADA case, in which the petitioner clearly has an interest in a job compatible with her disability, does the misstatement of material facts in the case constitute an error which, if not corrected at the appellate level, denies the petitioner due process under the Fourteenth Amendment of the United States Constitution.

B. Whether in an ADA case, when a specific job can result in the success or the failure of the disabled in the workplace, does a misapplication of the principles of summary judgment constitute a denial of due process under the Fourteenth Amendment of the United States Constitution.

C. Whether the disposition and operation of the Court created a hostile environment, prejudicial to the petitioner, which curtailed discovery and thereby denied due process under the Fourteenth Amendment of the United States Constitution.

## TABLE OF CONTENTS


| | PAGE |
|---|---|
| **QUESTIONS PRESENTED FOR REVIEW** | i |
| **TABLE OF CONTENTS** | ii |
| **TABLE OF AUTHORITIES** | iii |
| **OPINION BELOW** | 1 |
| **JURISDICTION** | 2 |
| **CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED** | 2 |
| **STATEMENT OF THE CASE** | 2 |
| **REASONS FOR GRANTING THE WRIT** | 3 |
| **CONCLUSION** | 10 |
| **APPENDIX** | 1a-49a |
| A. Regular Board Meeting—West Clark Community Schools Excerpts, June 11, 1998 | 1a-3a |
| B. Regular Board Meeting—West Clark Community Schools Excerpts, May 14, 1998 | 4a-6a |
| C. Joyce E. Wiseman Letter of July 23, 1998 to Terry Smith, David Knies, Roberta Salmon, and Bose, McKinney & Evans | 7a-9a |
| D. Terry E. Smith Letter of July 27, 1998 to Joyce Wiseman, James Lang, and Chuck Rubright (Bose, McKinney & Evans) | 10a |
| E. United States Court of Appeals for the Seventh Circuit, Unpublished Order, July 25, 2000 | 11a-14a |
| F. United States District Court, Southern District of Indiana, New Albany Division, Case NA98-170-C-B/S | 15a-49a |

## TABLE OF AUTHORITIES


| | PAGE |
|---|---|
| **Cases:** | |
| *Doe* v. *R.R. Donnelley & Sons Co.*, 42 F. 3d 439 . | 7 |
| *Drake* v. *Minnesota Mining & Mfg. Co.*, 134 F. 3d 878 | 7 |
| *Nelson* v. *Thornburgh*, 567 F. Supp. 369 | 5 |
| *Patterson* v. *Chicago Assoc. for Retarded Citizens*, 150 F. 3d 719 | 7 |
| *Spraying Sys. Co.* v. *Delavan, Inc.*, 975 F. 2d 387 | 7 |
| *Susie* v. *Apple Tree Preschool & Child Care Center*, 866 F. Supp. 390 | 8 |
| **Statutes:** | |
| 42 U.S.C. Sec. 12201; 12112, et seq. | 2 |
| 28 U.S.C. Sec. 455 | 2, 9 |
| **Constitutional Provisions:** | |
| United States Constitution amendment 14 | 10 |
| **Rules of Procedure:** | |
| Rules of Supreme Court 10(a) | 3, 7 |
| Rules of Supreme Court 10(c) | 8 |

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## PETITION FOR WRIT OF CERTIORARI

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### OPINION BELOW

On July 25, 2000 the Court of Appeals for the Seventh Circuit entered an opinion (CA No. 99-3451) affirming the entry of summary judgment of the United States District Court for the Southern District of Indiana, New Albany Division in "*Salmon* v. *West Clark Community Schools*" (D.C. No. 98-170-C-B/S).

## JURISDICTION

Jurisdiction of this Court is invoked under Title 28, United States Code, Sec. 1254 and 42 United States Code, Sec. 12201; 12112, *et seq.*

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

A. Constitutional Provisions:

1. United States Constitution Amendment 14

B. Statutory Provisions:

1. 42 United States Code, Sec. 12201, *et seq.*
2. 28 United States Code, Sec. 455

## STATEMENT OF THE CASE

On March 6, 1998 the Petitioner met with her employers to make them aware of a medical condition which affected her employment and which qualified her as disabled under the ADA.

At the time of the March 6, 1998 meeting the Petitioner was a secondary teacher and gifted talented coordinator for the West Clark Community Schools Corporation.

The Petitioner had been employed in the position for six years.

After the March 6, 1998 meeting the Petitioner's employers responded to the disclosure of her disability by taking her junior high teaching job from her and reassigning her to an elementary teaching job.

At the March 6, 1998 meeting the Petitioner communicated the inappropriateness of an elementary assignment due to the limitations imposed by her disability.

The Petitioner tried repeatedly throughout the summer of 1998 to get her employers to meet with her to discuss in detail her disability-imposed limitations relative to teaching in an elementary classroom.

After the March 6, 1998 meeting the Petitioner's employers refused to meet with her.

## REASONS FOR GRANTING THE WRIT

A. The Court of Appeals for Seventh Circuit has sanctioned an order involving an important federal question which so far departs from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's supervisory power. Rules of Supreme Court 10 (a).

The Seventh Circuit Court of Appeals makes only two points in support of Chief Judge, Sarah Evans Barker's summary judgment. Each point is a restatement of a point made by Judge Barker. Each point is materially in error.

1. The Court, in a footnote, sets aside the question of whether driving is an accommodative issue under the ADA, but in the text of its argument the Seventh Circuit discusses driving, at length, and finally ties the issue to Salmon's utterance," . . . that would be fine." Salmon Dep. 68.

However, an examination of the context of this statement shows what was under consideration when this consent occurred and actually what Salmon was finally agreeing to was the junior high senior high split assignment which Superintendent Smith took to the May 14, 1998 School Board meeting.

2. Secondly, the Seventh Circuit contends that Salmon was largely relieved of any monitoring or supervisory duties with respect to the extra duties of the elementary school teacher.

In fact, Salmon was never removed from Henryville Elementary's duty roster. Smith even acknowledges he was aware the Petitioner was assigned elementary duties. Smith Dep. 112: 10-16.

The Seventh Circuit Court of Appeals adopts Chief Judge Barker's "characteristically thorough opinion" that stated

facts, material to the case, which are in dispute in the record.

3. Barker clearly contends the Board unanimously accepted Smith's recommendation to assign Salmon to a full time teaching position at Henryville Elementary with a classroom aide. Barker at pg. 10, para. 2. (Appendix 22a).

Salmon did not begin the '98-'99 school year with a classroom aide and the School Board made no provision for such a person according to the minutes of its June 11, 1998 meeting. (Appendix 20a).

4. Barker paints the picture of an interactive process continuing after the March 6, 1998 meeting. Barker at pg. 7, para. 3. (Appendix 20a).

In fact, there were no meetings with the Petitioner after the March 6, 1998 meeting according to Smith. Smith Dep. 39:18-40:2.

5. Barker bolsters the image of accommodation by claiming that once the School investigated "non-driving" teaching assignments it located a vacancy at Henryville Elementary. Barker at pg. 41, para. 2. (Appendix 46a).

However, Barker notes that at the May 14,1998 School Board meeting the Board discussed assigning "Salmon" to another job. Barker at pg. 6, para. 2. (Appendix 19a).

Also it was at this meeting the Board "located" a vacancy at Henryville Elementary. Barker at pg. 38, Ft Nt 7. (Appendix 43a).

6. Thus, the chronology of events clearly demonstrates there was no purposeful intent on the part of the School Board to locate a placement for the Petitioner which better suited her needs as a result of her disability.

Smith went to the May 14, 1998 Board meeting ready to recommend the Petitioner's transfer to a junior high-senior high split assignment. Smith Dep. 44:16-17.

At this meeting an elementary principal (not on the agenda) spoke up and informed the Board he had an opening at Henryville Elementary for the Petitioner to fill. Smith Dep. 45:8-13., Barker at pg. 38, Ft Nt 7. (Appendix 43a).

The elementary principal's action challenged Smith's recommendation of a secondary placement for the Petitioner and tabled this option. Smith Dep. 46:21-47:4., School Board minutes of May 14, 1998. (Appendix 5a).

By the next meeting of the School Board, June 11, 1998, Smith completely reversed himself and recommended the transfer of the Petitioner to an elementary assignment at Henryville. (Appendix 2a).

Thus, the record is clear that the discussion at the May 14, 1998 Board Meeting was not about a placement for the Petitioner that best suited her disability. The discussion was entirely about the needs of the School Corporation-should the Petitioner be removed from her current job assignment.

7. Barker argues that the elementary assignment was reasonable because it avoided the creation of a new assignment and unnecessary spending. Barker at pg. 41, para. 2. (Appendix 46a).

Barker is making the argument that any additional spending is unnecessary spending. But this is not the standard set out in the legislation which imposes a potential fiscal burden upon the employer. See *Nelson* v. *Thornburgh*, 567 F. Supp. 369, 379, 380.

Nelson states some of the factors which must be considered if an employer is given relief from his ADA responsibilities because of an "undue burden". Among these factors is the overall size of the recipient's program with respect to size of budget and the nature and cost of the accommodation needed.

Barker never explains how it is more cost effective for the Petitioner to teach elementary students. In fact, the as-

signment of the Petitioner to teach junior high students was a scheduling and logistics problem for the school corporation, not a cost problem.

The new assignment that Barker said the Board avoided "creating" was, in fact, "created" according to the June 11, 1998 School Board minutes, and this new junior high teaching position was given to another teacher (who also holds an elementary license). (Appendix 2a).

8. Barker's assertion that the School Corporation was making a good faith effort to accommodate the Petitioner's disability is valid only if the School Corporation discussed this new junior high opening with the Petitioner.

Barker noted that the School Corporation understood before the beginning of the '98-'99 school year the Petitioner would agree to a solution in which she would teach part-time until a full-time 'secondary' level position would become available." Barker at pg. 12, para. 1. (Appendix 23a).

Joyce Wiseman, ISTA Uniserve Director (teachers' union) in a letter dated July 23, 1998 requested consideration for the Petitioner along these lines. (Appendix C).

The West Clark Community Schools' response was delivered in a letter dated July 27, 1998 in which Smith states the School Corporation had decided to defend all actions." (Appendix D). Note the c.c. on each letter to Chuck Rubright at Bose, McKinney & Evans (law firm) at this early date.

In fact, after the March 6, 1998 meeting the School Corporation refused to meet with the Petitioner to discuss her teaching assignment for the following school year. Smith Dep. 75:21-76:5.

The West Clark Community School Corporation was not promptly responding to the urgent pleas of a disabled employee, as Judge Barker concludes. Instead, the School Corporation was urgently responding in an attempt to turn the Petitioner's claim of failure to accommodate a junior

high teaching assignment into a question of how to accommodate the Petitioner as an elementary teacher.

B. The Court of Appeals for Seventh Circuit has sanctioned an order involving an important federal question which so far departs from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's supervisory power. Rules of Supreme Court 10(a).

The Seventh Circuit Court of Appeals declined to apply the principles of summary judgment, as developed through federal case law, to Judge Sarah Evans Barker's summary judgment.

1. A Court must draw all reasonable inferences in the light most favorable to the non-movant. See *Spraying Sys. Co.* v. *Delavan, Inc.*, 975 F. 2d 387, 392.

2. In cases such as this, the criteria associated with summary judgment must be applied with ". . . added scrutiny because matters of intent and credibility are crucial issues." *Doe* v. *R.R. Donnelley & Sons Co.*, 42 F. 3d 439,443; *Drake* v. *Minnesota Mining & Mfg. Co.*, 134 F. 3d 878, 883.

3. Employment discrimination cases are amenable to disposition by summary judgment so long as there is no genuine dispute as to the material facts. *Patterson* v. *Chicago Assoc. for Retarded Citizens*, 150 F. 3 d 719, 723.

4. Barker appears to be confused about the Petitioner's deposition, but instead of seeking clarification, Barker analyzes the Petitioner's remarks with the presumption that the Petitioner ". . . disliked" the elementary setting. Barker at pg. 25, para. 3; pg. 26, para. 1. (Appendix 34a).

Barker even second-guesses the Petitioner's motive for bringing forth her claim, suggesting there was something sinister about the Petitioner's disclosure of her disability. Barker at pg. 22, para. 3. (Appendix 32a).

For these reasons alone the Seventh Circuit Court of Appeals should have applied the standard set forth in *Susie*

v. *Apple Tree Preschool & Child Care Center,* 866 F. Supp. 390, 397:

> ". . . issues of an employer's motivation in discharging an employee — often riddled with subtleties and nuances from which vastly different conclusions may be drawn — are particularly well suited for determination by the ultimate trier of fact — in this case, a jury."

C. The Court of Appeals for the Seventh Circuit has decided an important question of federal law that has not been, but should be, settled by this Court. Rules of Supreme Court 10(c).

The Seventh Circuit Court of Appeals' contention that

> ". . . although Salmon suggests that she neither needed nor requested any immediate change in her teaching assignment . . . the undisputed evidence in the record belies this characterization of the facts," (Posner at pg. 2, para. 2). (Appendix 12a).

reflects the degree to which the Seventh Circuit was swayed by the disposition of the lower court and the counsel for the Defendant-Appellee while denying the Petitioner a voice in the process.

In fact this impression of the Seventh Circuit is a toned-down restatement of an accusation by Wheeler (Bose, McKinney & Evans) in which he accuses the Petitioner of lying and attempting to rewrite the record. Wheeler's Brief of Defendant-Appellee West Clark Community Schools. pg. 14, para. 2.

I. Wheeler accuses Salmon of being dishonest in claiming she could have continued in her junior high/gifted talented position because she had told her employer "she could not drive."

2. But it was Wheeler's own line of questioning that demonstrated the Petitioner was expressing concern with

the progressive nature of her disability at the March 6, 1998 meeting. There was no immediate problem with the Petitioner's driving. Salmon Dep. 67:25-68:8

This part of the record is wholly consistent with the Petitioner's assertion that she did not seek an "immediate" change in her teaching assignment at the March 6, 1998 meeting.

Barker expresses a disdain for the ADA and the disabled who would appear in her court when she opines: "It does not take much for an employee to activate an employer's potential liability under the ADA . . ." Barker at pg. 20, para. 1. (Appendix 30a).

Barker acknowledges that the Petitioner's physician (Lowenthal) recommended a junior high placement as an appropriate teaching assignment given her disability.

However, Barker claims that the recommendation is the result of "Salmon's own unsubstantiated and self-serving representations. Barker at pg. 11, Ft Nt 2. (Appendix 22a).

Barker's lack of objectivity in these proceedings is evident when she describes the Petitioner's disability as a tool of opportunism. Barker at pg. 19, para. 2. (Appendix 29a).

Again Barker is adamant that there is no possible disparate treatment claim that the Petitioner could make that would be looked on favorably by her court. Barker at pg. 42, Ft Nt 9. (Appendix 47a).

Before this case the Petitioner was unknown to Judge Sarah Evans Barker. Judge Barker had, however practiced as a partner in the law firm of Bose, Mckinney and Evans, the law firm representing West Clark Community Schools.

Because Barker chose not to disclose this prior relationship (as would have been prudent under 28 U.S.C. Sec. 455) her judgment, to the Petitioner, is partial for the defendant.

The Seventh Circuit Court of Appeals required oral argument of the case, but declined to respond to the oral arguments or to any of the issues of law brought by Plaintiff's counsel.

For all the legal posturing, the judicial result through the appellate level was to leave a legally blind teacher to her own resources in providing sound education and safety of elementary school children.

## CONCLUSION

The Petitioner approached her employer out of concern for needs of public school children. Because the Petitioner's employer assigned her to a job even more difficult for a visually impaired teacher, the needs of those students are still not being met.

The courts have participated in the diminution of the ADA in this case by denying the Petitioner due process and an opportunity to pursue the discovery necessary to ascertain the accuracy of the material facts in question.

For this and all the foregoing reasons, the Petitioner respectfully submits that the petition for Writ of Certiorari be granted.

Respectfully submitted,

ROBERTA S. SALMON
*Petitioner Pro Se*
109 Farrington Drive
New Albany, IN 47150

CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing document was served upon the following counsel by United States mail, postage prepaid, first class, this _____ day of _____ 2001:

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# APPENDIX A

## REGULAR BOARD MEETING — WEST CLARK COMMUNITY SCHOOLS EXCERPTS

JUNE 11, 1998

Regular Board Meeting
West Clark Community Schools
601 Renz Avenue
Sellersburg, IN 47172

June 11, 1998, 7:00 P.M.

The regular board meeting was called to order by President Roy Nett at 7:05 P.M.

The Pledge of Allegiance was led by Buddy Coats and the invocation given by Doug Coffman.

The roll was called by President Roy Nett, with the following board members being present: President Nett; Vice-President Mike Ooley; Secretary, Doug Coffman; and members Sandra Furnish Banet and Buddy Coats. Also present were Superintendent, Terry Smith and Attorney James Lang.

Present in the audience were Reporter Tim Goebel from The Evening News, Patty Culp, Sarah Culp, Josh Culp, Jerry Culp, Matt Donahoe, Patty Renn, Frank Brown, David Burgin, Myra Powell, Teresa Guthrie, Nancy Emery, S. Diane Carver, and Jennifer Crum.

### CONSENT MINUTES

Mr. Nett asked the Superintendent to proceed with the Consent Agenda. The May 14, 1998 minutes were presented for approval, with no corrections being noted.

### CLAIMS

The claims were presented for approval as follows:

817-1014

9809, 9811 & 9812

| | |
|---|---|
| GENERAL | $259,721.90 |
| DEBT SERVICE | $5,000.00 |
| CAPITAL PROJ | $27,799.57 |
| TRANSPORTATION | $30,778.57 |
| TRANS-BUS PURCH | $0.00 |
| SPEC ED PRE-SCH | $0.00 |
| SCHOOL LUNCH | $30,481.58 |
| EDUC LICENCE PL | $0.00 |
| LIBRARY GRANT | $4,687.59 |
| WHAS CRUSADE | $0.00 |

KINDERGARTEN: BES: MISTY RAY

For Kindergarten teacher at Borden Elementary School. Mr. Smith recommended Misty Ray, as one of the choices of Principal Myra Powell.

ELEMENTARY TEACHER HES: SALMON

Mr. Smith recommended the transfer of teacher Roberta Salmon to the elementary teaching position at Henryville Elementary. Also, since a half day of her schedule at Silver Creek Junior High still needs to be covered, to allow Mr. Bailey to assign part-time teacher Melanie Schindler to 3 more classes, making her position 5/6.

SUMMMER SCHOOL ENGLISH TEACHERS

Summer School teachers: English, High School for credit classes: (80 hrs each)

Robert Kinder, SCHS, 20 days, $3,341.60
Stefan Lewis, SCHS, 20 days, $3,096.80
Jeff Schroeder, HHS, 20 days, $2,208.80

SUMMER SCHOOL DRIVER ED TEACHERS

Summer School, non credit Driver Education instructors.

Each teacher has 12 students @ 6 hours each =72 hours

Phil Downey = $1440
Mike Carter = $1440
Tom Traylor = $1440
Ken Trinkle =$1440
Matt Thomas = $1440
Dale Ricketts = $1440
John Bradley = $1440
Tom Dietrich = $1440

Plus, they will each receive a pro-rated portion of any monies left after expenses are paid.

ECA AND COACHING

The following ECA/Coaching positions were approved, as recommended, for 1998-99.

Silver Creek High School
Athletic Director: Larry Richmer
Asst. Athletic Director: Joe Decker
Head Baseball: Joe Decker
Head Boys Basketball: Matt Thomas
J.V. Boys Basketball: Joe Ledbetter
Head Cross Country: Al Eckert
Asst. Cross Country: Steve Doyle
Head Golf: Joe Ledbetter
Head Boys Tennis: M. Crabtree/R. Emery

## APPENDIX B

## REGULAR BOARD MEETING — WEST CLARK COMMUNITY SCHOOLS EXCERPTS

MAY 14, 1998

Regular Board Meeting
West Clark Community Schools
601 Renz Avenue
Sellersburg, IN 47172

May 14, 1998, 7:30 P.M.

The regular board meeting was called to order by President Roy Nett at 7:36 P.M.

The Pledge of Allegiance was led by Sandy Furnish Banet, and the Invocation given by Jon Millman.

Mr. Nett called the roll, with the following board members being present: Roy Nett, President; Mike Ooley, Vice-President; Doug Coffman, Secretary; Members Sandy Furnish Banet and Buddy Coats. Also present were Superintendent Smith, Assistants Millman and Shireman, and Attorney James Lang.

ROLL CALL

Included in the audience were Phyllis Rhodes, reporter; Principals Mike Crabtree, Ron Lancioni, and Fred Finch; Wayne and Debbie Rieger; Dave Knies; student Chris Mooch and his mother; board members-elect Teresa Guthrie and Brian Hurst, as well as several other patrons. Mr. Nert asked the Superintendent to proceed with the Consent Agenda.

MINUTES CLAIMS

First the April 9th and 30th minutes were presented for approval. Next, Mr. Millman presented the claims, as follows: Claim #601-816

| | | | |
|---|---|---|---|
| 10 General | $673,294.58 | Payroll #9808-9810 | |
| 20 Debt Service | $300.00 | | |
| 35 Capital Proj. | $93,547.57 | Liabilities | $484,133.73 |
| 41 Transportation | $15,413.94 | | |
| 42 Trans-Bus Purch | $182,389.68 | Total | $1,547,369.13 |
| 60 Spec Ed Pre-Sch | $37,698.69 | | |
| 80 School Lunch | $38,514.98 | PR 9808 | $280,115.89 |
| 191 Library Grant | $899.98 | PR 9809 | $269,539.94 |
| 292 Fund for Arts | $345.00 | PR 9809D | $259,235.74 |
| 374 Net Day Grant | $44.85 | PR9810 | $319,233.48 |
| 375 Perforaaance Awd | $2,302.46 | PR 9810A | $72,235.60 |
| 376 Indiana 2000 | $479.49 | | |
| 378 Internet Grant | $920.57 | Total PR | $1,200,360.65 |
| 392 Mentors Grant | $80.00 | | |
| 396 Tech Prep | $9,732.40 | **Grand Total** | **$2,747,729.78** |
| 399 Access Indiana | $1,667.75 | | |
| 418 Chapter I | $3,591.49 | | |
| 584 Drug Free | $749.41 | | |
| 593 Eisenhower Gr | $992.56 | TOTAL | $1,063,235.40 |

Mr. Coats stated he wanted to explain his nay vote. He stated this is an unfair agreement, and he did not like the way it was negotiated by the attorneys.

## REASSIGN SALMON

The next item was reassignment of the G.T. teacher, Mrs. Salmon. Mrs. Banet made a motion to table the item, but there was no second. Mr. Coffman made a motion to let the Superintendent determine her assignment, after talking to the principals about it.

Motion: Doug Coffman
Second: Buddy Coats
Vote: 4-0, (1 abstention)

Mrs. Banet stated she wanted (a report on this) to "come back to the board".

## MATH ADOPT

Mr. Shireman presented the 1998-2004 Mathematics Textbook Adoption recommendations as follows:

Elementary Mathematics — Grade K
Publisher — Saxon Publishers
Text — Saxon Mathematics K — 1997 Edition

Elementary Mathematics — Grades 1-6
Publisher — Saxon Publishers
Text — Saxon Mathematics 1-24 to Math 76-1997 Ed

Regular Mathematics — Grades 7-8
Publisher — Saxon Publishers
Text — Saxon Math 65, 76, 87, Algebra 1/2

Algebra 1 — Grades 7-8
Publisher — McDougal Little
Text — Heath Algebra I-Explorations/Apple 98 Ed

Mathematical Problem Solving — High School
Publisher — Glencoe/McGraw Hill
Text — Math Conn Integ & AppI 98 Ed

Introduction to Algebra I & II — High School
Publisher — McDougal Littell
Text — Heath Algebra I Explore/Appl 98 Ed

Algebra I — High School
Publisher — McDougal Littell

## APPENDIX C

## JOYCE E. WISEMAN LETTER OF JULY 23, 1998 TO TERRY SMITH, DAVID KNIES, ROBERTA A. SALMON, AND BOSE, MCKINNEY, & EVANS

[LETTERHEAD OF INDIANA STATE TEACHERS ASSOCIATION]

July 23, 1998

Mr. Terry Smith, Superintendent
West Clark Community Schools
601 Renz Avenue
Sellersburg IN 47172

RE: Roberta Salmon

Dear Mr. Smith:

I have had numerous conversations and meetings with Roberta Salmon and have reviewed her correspondence to and from you. I believe that communications on this situation need to be clarified. In order to do that, I am, first, sending you this letter and, second, asking for a meeting between you, Dave Knies and myself.

In my attempt to solve the problem, I would like to start by trying to identfy the exact problem and state what I believe are some facts in the case.

1. Ms. Salmon is qualified and able to perform the essential functions of her job—teaching—with reasonable accommodation.

2. Ms. Salmon's physical impairment does substantially limit a major life activity—seeing. In letters from her doctors dated May 27, 1998, and June 8, 1998, they have indicated that she is considered legally blind by visual field criteria.

3. Reasonable accommodation has been defined by the EEOC as "any change or adjustment to a job or work environment that perniits a qualified applicant or employee

with a disability to participate in the job application process, to perform the essential functions of a job, or to enjoy benefits and privileges of employment equal to those enjoyed by employees without disabilities." Some examples given are acquiring or modiflying equipment or devices, job restructuring, part-time or modified work schedules, reassignment to a vacant position, etc.

4. A reasonable accommodation becomes an undue hardship, according to EEOC, when it would be unduly costly, extensive, substantial or disruptive, or would fundamentally alter the nature or operation of the business.

5. Ms. Salmon met with Mr. Shireman and yourself on March 6, 1998, to discuss her teaching assignment for 1998-99. Unfortunately, at that meeting Ms. Salmon was unaware of her rights under the ADA. There has been a question raised about whether Ms. Salmon has requested an accommodation under the ADA. If that is true, Ms. Salmon hereby officially requests that accommodation. Also, at the time of this meeting, Ms. Salmon did notify you that it would be perilous to be placed in an elementary setting. She indicated that her visual limitations were not conducive to an elementary teaching position. At that time, you indicated that you were considering a possible placement at Silver Creek High School and her current half-day placement at Silver Creek Jr. High School.

6. Because Ms. Salmon was not aware of her rights for accommodation under the ADA, she turned down a science assignment because of the lab situation. She was not aware that she could have requested assistance when in the lab.

7. Ms. Salmon requested not to have a traveling job (going to 5 different school buildings), but is certainly willing to take a split job—part-time in more than one school. She is also willing to teach at a school not located in Sellersburg, i.e. the part-time science position at Henryville. She is even willing to look at only teaching part-time this year, if she can have some rights to a full-time position if

one opens up in the future on the secondary level for which she is qualified.

8. The problem can be defined very simply, Ms. Salmon qualifies under the ADA as an individual with a disability. As a result of that fact, Ms. Salmon needs to have an accommodation to enable her to perform her job.

May we please sit down and discuss this problem in a reasonable manner. We need to concentrate on the problem at hand in an effort to resolve it. I suggest we explore all the possible alternatives and look at what is best for the children, Ms. Salmon and the West Clark Community Schools. I would like to meet on Monday, July 27, in the morning if possible. Please let me know if this is convenient as soon as possible.

Sincerely,
/s/ Joyce E. Wiseman
Joyce E. Wiseman
ISTA UniServ Director, 3-G

cc: Mr. Chuck Rubright, BOSE, McKINNEY & EVANS
Roberta Salmon
Dave Knies

## APPENDIX D

## TERRY E. SMITH LETTER OF JULLY 27, 1998 TO JOYCE WISEMAN, JAMES LANG, AND CHUCK RUBRIGHT (BOSE, MCKINNEY, & EVANS)

[LETTERHEAD OF WEST CLARK COMMUNITY SCHOOLS]

July 27, 1998

Ms. Joyce E. Wiseman
ISTA UniServ Director
3314 Grant Line Road, Suite 2
New Albany, IN 47150

RE: Your letter of July 23, 1998: Ms. Sairnon

Dear Ms. Wiseman,

Thank you for your letter as above designated. Please be advised that West Clark Community Schools most certainly made a reasonable accommodation in the assignment of Ms. Salmon to Henryville Elementary.

I appreciate your definitions in paragraph three; however, some of those are simply incorrect and do not come within the definition of reasonable accommodation as set forth in 42 USC Sec. 12101-12213.

However, if there are any issues of accommodation with her Henryville Elementary assignment, we are certainly willing to discuss those further accommodations. We are not obligated to place her in a different building, though.

This corporation has made proper and reasonable accommodation. We have decided to defend all actions. Thank you for your inquiry.

Respectfully,
/s/ Terry E. Smith
Terry E. smith
Superintendent

cc: James Lang
Chuck Rubright

## APPENDIX E

**UNPUBLISHED ORDER**

**NOT TO BE CITED PER CIRCUIT RULE 53**

# UNITED STATES COURT OF APPEALS

**FOR THE SEVENTH CIRCUIT**

CHICAGO, ILLINOIS

**No. 99-3451**

ROBERTA S. SALMON, - - - *Plaintiff-Appellant,*

*v.*

WEST CLARK COMMUNITY SCHOOLS, - - - - - - - *Defendant-Appellee.*

*Appeal from the United States District Court for the Southern District of Indiana, New Albany Division*
*No. 98 C 170*
*Hon. Sarah Evans Barker, Chief Judge*

**ORDER**—Argued June 9, 2000
Decided July 25, 2000

BEFORE: Honorable RICHARD A. POSNER, *Chief Judge;* Honorable WILLIAM J. BAUER, *Circuit Judge;* Honorable ILANA DIAMOND ROVNER, *Circuit Judge.*

Shortly after she disclosed to the superintendent of West Clark Community Schools that she has a degenerative eye condition, teacher Roberta S. Salmon was given a new teaching assignment that relieved her of the need to commute among five different schools per week. Salmon perceives the change as unfavorable, however. in her new position, she teaches fourth grade full-time; in her former posting, she both taught both junior high school students and served as an itinerant resource teacher for gifted second- through sixth-grade students. She filed suit under the

Americans with Disabilities Act, 29 U.S.C. § 12101, *et seq.*, asserting that the school district effectively discriminated against her once it became aware that she had a disability and that the fourth-grade posting was an improper assignment resulting from a breakdown in the interactive process that the ADA requires. In a characteristically thorough opinion, Chief Judge Barker found not evidence to support these arguments and entered summary judgment in favor of the schbol district. *Salmon* v. *West Clark Community Schools,* 64 F. Supp. 2d 850 (S.D. Ind. 1999). We need make only two points in response to the arguments Salmon presses on appeal.

First, although Salmon suggests that she neither needed nor requested any immediate change in her teaching assignment when she disclosed her eye condition to school district superintendent Terry E. Smith, "[t]he undisputed evidence in the record belies this characterization of the facts," as Judge Barker pointed out. 64 F. Supp. 2d at 860.[1] It is agreed that when Salmon met with Smith and his instructional assistant, Robert Shireman, on March 6, 1998, she told them that as a result of her eye condition, her ability to drive a car was gradually declining. *See* Salmon Dep. 63-64, 72. The natural import of that statement is that sooner or later, she would require a different teaching assignment that did not require her to drive from school to school. Indeed, two follow-up letters that Salmon wrote to the school board and Smith confirm that her intent in meeting with Smith was to alert the district that she could not continue indefinitely to meet the demands of the assignment she held at that time. On June 6, 1998, she explained to the School Board that the purpose of the meeting "was to inform administration of my inability to con-

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[1] We set aside the question of the school district's potential obligation to consider, whether requested to or not, reassigning an employee who is legally blind *(see* Salmon Supp. App. 119, Salmon Dep. 65-66) to a position that does not require her to drive herself from school to school.

tinue commuting to five schools per week due to a medical condition (which I asked be kept confidential)." Salmon Supp. App. 118. On June 15, she wrote to Smith that "I met with you and Mr. Shireman to advise you of my condition and how driving to five schools per week in fulfilling the elementary responsibilities of my current teaching assignment was becoming increasingly hazardous." Salmon Supp. App. 120. Likewise, in the charge questionnaire she submitted to the EEOC, Salmon recounted that "[o]n March 6,1998 I met with the superintendent of my school corporation to inform him of a medical condition which I believed put the corporation & myself at risk." *See* Salmon Dep. Defendant's Ex. 4 at 1. Even Salmon's deposition testimony, in which she asserted that she remained able to operate a motor vehicle, conceded that driving was only going to become more "difficult" given the degenerative nature of her eye condition. Salmon Dep. at 63-64; *see also Id.* at 67-68; Salmon Supp. App. 116. All of these statements signal that Salmon in fact was requesting a change of assignment, and her own assertion that commuting among schools was becoming "increasingly hazardous" (Salmon Supp. App. 120) suggests that she was encouraging the school district to make the change sooner rather than later. Indeed, when Smith proposed at the March 6 meeting that the district attempt to identify an assignment for the following school year that would not require her to drive, Salmon, by her own account, told him "that would be fine." Salmon Dep. 68.

Second, although Salmon describes her new assignment teaching fourth grade as an adverse employment action, she has introduced no evidence to support that claim. One can readily imagine that the fourth-grade assignment posed different demands than her former assignment teaching junior high and gifted elementary students. But the record does not reveal any sense in which the reassignment could be said to have objectively altered the terms, conditions, or pnvileges of her employment. *See Williams* v. *Bristol-Myers Squibb Co., 85* F.3d 270, 274 (7th Cir. 1996). Citing *Rodriguez* v. *Board of Educ. of Eastchester Union Free*

*School Dist.*, 620 F.2d 362, 366 (2d Cir. 1980), Salmon suggests that the new post is inappropriate because her disability "has severely diminished the instructional skills necessary to teach at the elementary level due to the maturity level of the students." Salmon Br. 17. The record only supports this notion, however, in the sense that by virtue of her limited peripheral vision, Salmon has difficulty monitoring children who are moving about and/or are at a distance from her. *See* Salmon Supp. App. 117, 119; Salmon Dep. 84-86. Consistent with that limitation, however, she largely has been relieved of any monitoring or supervisory duties with respect to the cafeteria, playground, or school buses.[2] Salmon also suggests that the assignment to teach the fourth grade "might also be thought to involve a significant loss of experience, and perhaps long-term prospects for advancement as well." Salmon Br. 17. Yet, Salmon cites nothing in the record the record that supports this assertion, and we have found nothing in the course of our own review. *See Galabya* v. *New York City Bd. of Educ.*, 202 F.3d 636, 64042 (2d Cir. 2000 (distinguishing *Rodriguez).*

We therefore reject these and the other arguments Salmon asserts on appeal. We AFFIRM the entry of summary judgment in favor of the defendant and ADOPT the district court's opinion.

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[2] In her deposition, Salmon appears to suggest that there is an increased need in the lower elementary grades to be able to monitor students visually so as to prevent them from harming themselves. Salmon Dep. 128-29. Yet, nothing in the record makes clear why Salmon would have been able to effectively monitor students in the junior high school setting, where; she preferred to remain, but not fourth-grade students.

## APPENDIX F

# UNITED STATES DISTRICT COURT
**SOUTHERN DISTRICT OF INDIANA**
NEW ALBANY DIVISION

**No. 98-170-C-B/S**

ROBERTA S. SALMON, - - - - - - *Plaintiff,*

*v.*

WEST CLARK COMMUNITY SCHOOLS, - - - - - - - - - - *Defendant.*

## ENTRY GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

Plaintiff, Roberta S. Salmon ("Salmon"), brings this action against defendant, West Clark Community Schools ("the School"), pursuant to the Americans With Disabilities Act ("ADA"), 42 U.S.C. § 12101 *et seq.* Salmon claims that the School discriminated against her because of her disability, a degenerative eye disease that resulted in her legal blindness, when it attempted to accommodate her disability by appointing her to a full-time position teaching fourth grade elementary students, instead of assigning her to teach full-time in a junior high setting. The School moves for summary judgment, rejoining that its efforts to accommodate Salmon were appropriate under the ADA and that it did not retaliate against Salmon for reporting her disability. For the reasons discussed, the School's motion must be GRANTED.

### Background

West Clark Community Schools hired Roberta Salmon in 1985 as an elementary schoolteacher at Memphis Elementary School. Salmon was certified to teach General Elementary, defined as grades one through six. *See* Pl.'s

Resp. at 2. In January 1989, Salmon completed her coursework for a Master's degree and received endorsements on her teaching license to teach language arts, social studies and science at the junior high school level (grades seven through nine). *Id.* Salmon requested a junior high placement following her junior high certification, but apparently did not teach any junior high classes until 1994. Between 1985 and 1992, Salmon taught various grades in elementary school, with her last assignment during that period at Henryville Elementary School teaching fourth grade. *Id.*

On August 4, 1992, Salmon expressed an interest in a gifted/talented ("GT") position teaching elementary students, partially located at the Silver Creek Junior High School ("SCJHS"). On August 19, 1992, the School assigned Salmon to the GT teaching position. *Id.* It consisted of teaching a GT magnet program to sixth graders for the morning (at SCJHS) and driving to four elementary schools in the afternoon to act as an itinerant GT resource teacher for fifth grade students at those locations. *Id.* at 3. While Salmon's sixth grade morning classes were located at SCJHS, her pupils still were elementary level. During the afternoon sessions, Salmon apparently would travel to each elementary school and "pull-out" the GT fifth-graders from their normal classes. Her duties required her to drive to Borden Elementary School (twelve miles from SCJHS) on Mondays, Henryville Elementary School (eleven miles from SCJHS) on Tuesdays, Sellersburg Elementary School on Wednesdays, and Stout Elementary School on Thursdays. On Fridays she traveled to Wilson Center to prepare her class materials. *See* Salmon Dep. at 33.

In 1994, the School altered the GT program located at SCJHS due to parental complaints that the sixth graders in the morning program were not being taught in their respective elementary schools. As a result, the School discontinued the morning magnet program at SCJHS and moved the sixth-graders back to their elementary schools, where they were taught on the same "pull-out" basis as

the fifth graders. From academic years 1994-95 to 1997-98, Salmon continued her afternoon sessions teaching elementary 'students without interruption, but the modification in the GT program removed her morning responsibilities, so she picked up a Spanish class, an English class, and study skills classes at SCJHS, teaching seventh and eighth grade students. *See* Pl.'s Resp. at 3.

In May and June 1997, Dr. Eric Berman, a specialist in Neuro Ophthalmology, treated Salmon and diagnosed her with retinitis pigmentosa sine pigmento, a degenerative eye disease characterized by decreased peripheral vision and difficulty with night vision. *Id.* at 3-4. In June 1998, Dr. Lowenthal, Dr. Berman's partner, described Salmon's condition as "a visual field constriction to within the central 200 in each eye, and for this reason she is considered legally blind by visual field criteria." *Id.* at 4.

On March 6, 1998, Salmon met with the School's Superintendent, Terry E. Smith ("Smith"), and an Instructional Assistant, Robert Shireman ("Shireman"), and informed them for the first time that she gradually was becoming restricted in her driving due to a degenerative eye condition. *Id.* Salmon's self-stated purpose of the meeting "was to inform administration of my inability to continue commuting to five schools per week due to a medical condition (which I asked be kept confidential)." Def.'s Ex. 1-I (Salmon June 6, 1998, letter to School Board). In her deposition, Salmon beats a hasty retreat from the "inability to continue commuting" language she used in her own letter, contending that she was able to drive, although it "would be difficult" for her to commute and could become "gradually more difficult for me to drive from one building to the next, because [her condition]... wasn't going to get better." Salmon Dep. at 63-64.

In a second letter after the March 6 meeting (addressed to Smith), Salmon described the March 6 meeting as follows: "[o]riginally I met with you and Mr. Shireman to advise you of my condition and how driving to five schools per week in fulfilling the elementary responsibilities of my

current teaching assignment was becoming increasingly hazardous." Def.'s Ex. 1-L (Salmon June 15, 1998, letter to Smith). Finally, in her affidavit to the Equal Employment Opportunity Commission ("EEOC"), Salmon summarized the content of the March 6, 1998, conference with Smith and Shireman: "[o]n March 6, 1998 I met with the superintendent of my school corporation to inform him of a medical condition which I believed put the corporation & myself at risk. I asked that my medical diagnosis/condition be kept in confidence. At this meeting the superintendent indicated he would work with me to accommodate my disability." Salmon Dep. at 72-74.

Salmon also informed Smith and Shireman during their March 6 meeting that she preferred to keep her morning junior high classes at SCJHS, and to pick up additional classes at that location for the full teaching day, a result that necessarily would supplant her teaching elementary students and traveling during the afternoon. *See* Def's Ex. 1-I.

Salmon and Smith also discussed various options to accommodate her disability, with Smith suggesting that they attempt to fashion an assignment for the following school year that "wouldn't entail [Salmon's] driving," to which she responded "that would be fine." Salmon Dep. at 68. One option Smith considered during the March 6 meeting was to maintain Salmon's morning schedule at SCJHS, and to create a new part-time position for her at the Silver Creek High School ("SCHS") teaching ninth grade English during the afternoon. *Id.* at 68-69. Salmon noted that this possibility raised a concern for the high school's accreditation, however, because even though she was authorized to teach ninth graders, she did not have a license to teach in the high school setting. *Id.* at 69-70.

On April 8, 1998, Salmon completed the School's annual "Teacher Survey," which solicited teachers' elaborations on their teaching preferences, retirement plans and salary adjustments for the following school year. *See* Def.'s

Ex. 1-G. In response to the questions, "Do you prefer being assigned to the same building?" and "Do you prefer the same teaching assignment next year?" Salmon circled the answers "yes." She added qualifications to her "yes" answers, however, explaining in writing that "[s]ince I am gradually becoming restricted in my driving', I prefer being at *one* building closest to my home & at the junior high level since I have no high school credentials." *Id.* (emphasis in original). Salmon also wrote that "I prefer not traveling from building to building." *Id.*.

On May 14, 1998, the School Board of Trustees ("the Board") conducted a routine public meeting (the Board publicly distributes its agenda in advance), where Board members discussed the necessity of modifying Salmon's current GT job responsibilities and possibly reassigning her to a different teaching position. *See* Smith Dep. 43-49, Ex. 3. Smith broached the topic of Salmon's picking up afternoon classes at SCHS, although some Board members were reluctant to create new teaching assignments at the high school. *Id.* at 44-45. One of the principals in the audience, Mr. Lancioni of Henryville Elementary School, interjected that he had a full-time position available and would like to have Salmon return to his school, where she taught full-time in 1992. *Id.* The Board did not make a personnel decision regarding Salmon on May 14 (one Board member moved to table the issue), and instead requested that *Smith* collaborate with the various principals involved before deciding on a course of action *Id.* Although the Board entrusted Smith with the authority to decide Salmon's appointment, he typically did not make final determinations on personnel assignments, and he felt more comfortable gauging the principals' input and returning to the Board for its final decision, which he did a month later on June 11, 1998. *Id.* at 46-47.

During the interim, Smith contacted the three principals of SCJHS, SCHS and Henryville Elementary. Mr. Bailey of SCJHS approved of Salmon's transferring full-time to Henryville Elementary as long as her morning

classes were covered, Mr. Crabtree of SCHS could utilize Salmon to create another ninth grade English section in the afternoon, but he noted that a reduction of class size was not essential. Mr. Lancioni of Henryville Elementary reiterated his earlier position that he would be pleased to have Salmon fill a lull-time teaching position vacancy in his school. *See* Smith Dep. at 49-50.

Smith also met with Salmon again and obtained additional medical information about her condition prior to the Board's June 11, 1998, meeting. On May 27, 1998. Dr. Berman detailed Salmon's condition in a letter sent to the School, which Smith relied upon as one factor favoring Salmon's transfer to Henryville Elementary. *See* Def.'s Ex. 1-H; Smith Dep. at *52-53*. Dr. Berman stated that due to Salmon's decreased peripheral vision, "it would be difficult for her to do any work which would require a lot of tasks of observation of children at distance.... I think that if she is in a limited setting, where people are in one place, she has good central vision, and I think she would do fine, however, I think that it may be more of a problem if she is in an outdoor area or a cafeteria where she has to pay attention to a lot of peripheral tasks." *Id*. Smith believed that an elementary school setting, where teachers are charged with one class of students in the same room for the entire day, involved less peripheral activity of students compared to the junior high or high school settings, where students (and sometimes teachers) rotate classes on an hourly basis after each "bell." *See* Smith Dep. at 88-89.

Smith and Salmon also met sometime in early June to discuss the recommendation he considered making to the Board regarding her teaching appointment. *See* Smith Dep. 58-60; Def.'s Ex. 1-I. Smith apparently informed Salmon that he intended to recommend that she be transferred to the full-time position at Henryville Elementary for the following school year. *Id*. Salmon requested that Smith reconsider this option, contending without explanation that her elementary placement would be perilous to both the students and herself. On June 6, 1998, Salmon put pen to

paper in a letter to the School Board and "unequivocal[ly]" voiced her dissatisfaction with the thought of her full-time appointment to Henryville Elementary. Def.'s Ex. 1-I.

On June 11, 1998, the Board conducted its routine monthly meeting. Smith recommended to the Board that, after consideration of the available options, Salmon fill the vacancy in the full-time teaching position at Henryville Elementary (either fourth or sixth grade), rather than creating a new part-time position for her to teach English at SCHS in the afternoon.

Several reasons motivated Smith's recommendation. He believed that Salmon's medical condition and driving difficulties resulted in a need to locate an afternoon assignment for her in lieu of her traveling elementary responsibilities. *See* Smith Dep. at 52-57. Also, some Board members were reluctant to incur the cost of creating another part-time teaching position at the high school, an option that would have allowed Salmon to maintain her morning assignment at SCJHS. While the afternoon high school assignment teaching English would not have increased Salmon's salary, the vacancy at elementary would have remained unfilled, which meant that the School would have been forced to hire another full-time teacher. *Id.* If Salmon filled the vacancy, however, a part-time teacher at the junior high school, Ms. Schindler, could pick-up Salmon's morning classes and remain part-time, as Ms. Schindler could add three classes to her two class schedule without being considered full4ime for salary purposes. Also, because the afternoon English classes that could have been formed specially for Salmon were never actually created, the School did not have to hire a teacher to cover those theoretical classes. (In reaction to Salmon's conveying her concern about her condition and ability to commute, the School restructured the afternoon GT elementary classes apparently without adding teaching personnel, and it eliminated the traveling itinerant GT teaching position altogether. *See* Compl. ¶ 19; Ans. ¶ 20; Smith Dep. at 29, 67-69.) The practical effect of the School's attempt to reassign Salmon

to a full-time job that did not involve driving is that it minimized its financial loss under the circumstances, an effort motivated by pressure from the teachers' union to increase salaries. *Id.*

The Board unanimously accepted Smith's recommendation to assign Salmon to a full-time teaching position at Henryville Elementary School (with a classroom aide). Displeased with this development, Salmon wrote a letter to Smith dated June 15, 1998, in which she emphasized that her teaching in an elementary school setting "is not an appropriate placement for me due to my worsening condition and the risk it may pose to me and those in my charge." Def.'s Ex. 1-L. She further characterized her placement in an elementary setting as "perilous," "stressful," "traumatic, "harmful," and concluded that "there is a substantial risk that injury could result from my employment as an elementary teacher."[1] *Id.* Salmon also stated that driving to five different schools in the afternoon to fulfill her elementary assignment "was becoming increasingly hazardous," and she "once again" requested that her condition be accommodated with a placement "at the junior high" and that the Board reconsider its decision.[2] *Id.*

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[1] Salmon never offers any explanation for why teaching fourth or sixth graders must be more "perilous" than teaching seventh or eighth graders in light of her eye condition. *See* discussion *infra* Part A.

[2] In her June 15, 1998 letter, Salmon attached a June 8, 1998, letter written by Dr. Lowenthal, who described Salmon as "legally blind." Def's Ex. 1-J. The doctor opined that Salmon could function as a teacher if children were not "moving about the room" and if she avoided laboratory situations. He added that Salmon "relates difficulties in working with the elementary school level," but he makes no independent medical judgment that Salmon's eye condition makes it any more or less difficult for her to teach elementary school rather than junior high. Indeed, Dr. Lowenthal relies upon Salmon's own unsubstantiated and self-serving representations that a junior high placement would be the only appropriate teaching assignment given her condition.

On June 20, 1998, Smith responded to Salmon's letter and recognized that she preferred a full-time teaching position at SCJHS, rather than one at Henryville Elementary. See Def.'s Ex. 1-M. He explained the bases for the Board's decision, stating that the School did not need an additional full-time position at SCJHS, and that the creation of high school English classes for her to teach in the afternoon would require the School to hire an additional teacher to fill the Henryville Elementary vacancy. Smith also failed to see how her condition favored her placement in junior high instead of in an elementary setting. On the contrary, he believed that the self-contained classroom of the elementary school minimized students' movement into and out of the classroom compared to a bell schedule of the junior high and high schools. Smith also believed that the elementary setting would allow Salmon to avoid changing rooms or buildings each day, which accommodated her request to be assigned to one location. *Id.*

On July 15, 1998, Salmon filed her charge of discrimination with the EEOC, asserting that the school violated the ADA by failing to accommodate her request "for a change in my teaching assignment" after she informed Smith of her disability on March 6, 1998. Def.'s Ex. 1-N. On July 24, 1998, Smith authored a letter to Salmon acknowledging her request that the Board meet with her in executive session to reconsider her teaching assignment, which the Board declined to do since it believed that it had already made a "reasonable accommodation" for Salmon under the circumstances. *See* Def.'s Ex. 1-P; Smith Dep. 73-74. The parties exchanged an additional salvo of letters at the end of July, with Salmon (through her union representative) suggesting for the first time that she would consider teaching part-time (assuming a full-time "secondary" level position would become available), and with the School suggesting accommodations for Salmon at her Henryville Elementary assignment.[3] *See* Def.'s Exs. 1-0, 1-Q. On Au-

[3] On August 27, 1998, Salmon requested Smith not to deduct union dues from her paycheck because "I am no longer a member of said association." Def.'s Ex. 1-X.

gust 12, 1998, Smith met with Salmon's union representatives, including the union's president, to discuss Salmon's teaching assignment. *See* Salmon Dep. 114-15. Smith represented that he was willing to transfer Salmon to a position for which she was qualified if one became available, but he reiterated that her assignment for the 1998-99 school year remained a reasonable accommodation. *Id.*; Def.'s Br. Summ. J. at 15.

On August 14, 1998, prior to the start of the 1998-99 school year, Smith directed Principal Lancioni to further accommodate Salmon by not assigning her to "cafeteria duty, playground supervision, or bus duty." Def.'s Ex. 1-S. By letter dated August 18, 1998, Salmon "unwillingly" accepted the school's "accommodation" for the 1998-99 academic year even though she contended that the assignment "presents a genuine substantial risk that injury may occur." Def.'s Ex. 1-U. On August 24, 1998, Smith responded in kind, noting that her letter did "not state what the 'genuine substantial risk' of injury is or to whom it may occur," and thanking Salmon for accepting her assignment. Def.'s Ex. 1-W.

On October 16, 1998, Salmon received her EEOC right-to-sue letter, and filed her Verified Complaint in this action on October 26, 1998. On November 23, 1998, Salmon filed a motion for a preliminary injunction, which she withdrew on February 8, 1999, opting instead to defend against the School's motion for summary judgment. *See* Pl.'s Resp. at 13. The parties apparently attempted without success to reach a mutually agreeable settlement of this matter. The 1999-2000 academic school year is upon us, so we turn to resolve the merits of Salmon's claims without further delay.

Summary Judgment Standards

Summary judgment is appropriate if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the mov-

ing party is entitled to a judgment as a matter of law." FED. R. Civ. P. 56(c). A genuine issue of material fact exists if there is sufficient evidence for a reasonable jury to return a verdict in favor of the non-moving party on the particular issue. *See Anderson* v. *Liberty Lobby. Inc.*, 477 U.S. 242,248, 106 S. Ct. 2505,2510,91 L.Ed.2d 202(1986); *Eiland* v. *Trinity Hosp., 150* F.3d 747, 750 (7th Cir. 1998). Yet, neither the mere existence of some alleged factual dispute between the parties, *Baulos* v. *Roadway Express. Inc.*, 139 F.3d 1147, 1152 (7th Cir. 1998), nor the existence of "some metaphysical doubt as to the material facts," *Fairchild* v. *Forma Scientific. Inc.*, 147 F.3d *567,* 571 (7th Cir. 1998) (internal quotations omitted) (*quoting Matsushita Elec. Indus. Co.* v. *Zenith Radio Corp.*, 475 U.S. 574, 586, 106 S. Ct. 1348, 89 L.Ed.2d 538 (1986)), is sufficient to defeat a motion for summary judgment.

In considering a motion for summary judgment, a court must draw all reasonable inferences in the light most favorable to the non-movant. *See Spraying Sys. Co.* v. *Delavan, Inc.*, 975 F.2d 387, 392 (7th Cir. 1992). When summary judgment is sought in an employment discrimination case, as here, the criteria associated with summary judgment must be applied with "added scrutiny because matters of intent and credibility are crucial issues." *Doe* v. *R.R. Donnelley & Sons Co.*, 42 F.3d 439, 443 (7th Cir. 1994); *Drake* v. *Minnesota Mining & Mfg. Co.*, 134 F.3d 878, 883 (7th Cir. 1998). However, "employment discrimination cases are not governed by a separate set of rules... they remain amenable to disposition by summary judgment so long as there is no genuine dispute as to the material facts." *Patterson* v. *Chicago Assoc. for Retarded Citizens, 150* F.3d 719, 723 (7th Cir. 1998) (internal quotations omitted) (*quoting Giannopoulos* v. *Brach & Brock Confections. Inc.*, 109 F.3d 406, 410 (7th Cir. 1997)). Thus, if it is clear that a plaintiff will be unable to satisfy the legal requirements necessary to establish her case, summary judgment is not only appropriate, but also required. *See Celotex*, 477 U.S. at 322, 106 S. Ct. at 2552; *Herman* v. *City of Chicago*, 870 F.2d 400, 404 (7th Cir. 1989).

## Americans With Disabilities Act[4]

### A. Reasonable Accommodation

Salmon asserts a failure to accommodate claim against the School, pursuant to the Americans with Disabilities Act, 42 U.S.C. § 12101 *et seq.* Salmon charges that the School's assignment of her to Henryville Elementary School represented a breakdown in the interactive process for which the School bears responsibility. Salmon also contends that when the School attempted to accommodate her concerns about teaching her afternoon elementary classes, it unreasonably removed her morning teaching responsibilities at the junior high school. We disagree with Salmon on both fronts and find that the School fashioned a reasonable accommodation for Salmon's eye disease after she reported it.

The ADA forbids a covered employer from discriminating "against a qualified individual with a disability be-

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[4] In the preliminary statement of her complaint, Salmon states that she has brought this action pursuant to the ADA, invoking that statute as her jurisdictional basis. Salmon also alludes generally to the Rehabilitation Act in the latter half of her complaint but without ever developing a legal argument under that statute in any of her subsequent pleadings. In any event, the ADA and the Rehabilitation Act are virtually identical, although the ADA has a broader scope. See *Bragdon* v. *Abbott*, 118 S. Ct. 2196,2202 (1998) (construing "the ADA to grant at least as much protection as provided by the regulations implementing the Rehabilitation Act"). Therefore, Salmon's putative claims under the Rehabilitation Act are dismissed for the same reasons animating our dismissal of her ADA claims. *See Crawford* v. *Indiana Dep't of Corrections*, 115 F.3d 481, 483 (7th Cir. 1997) ("The Rehabilitation Act is materially identical to and the model for the ADA, except that it is limited to programs that receive federal financial assistance.... [s]ince the ADA has a broader scope, we shall confine our discussion to it.") (citations omitted); *Rothman* v. *Emory Univ.*, 123 F.3d 446,450 (7th Cir. 1997) (finding that the Rehabilitation Act and the ADA are "nearly identical" and noting that both statutes are interpreted "consistent with Title VII").

cause of the disability of the individual in regard to job application procedures, the hiring, advancement, or discharge of employees, ... and other terms, conditions, and privileges of employment." 42 U.S.C. § 12112(a). The parties do not dispute that Salmon is a "qualified individual with a disability," but they do contest whether the School discriminated against Salmon by failing to reasonably accommodate that disability. The ADA prohibits a number of forms of disability discrimination, including discrimination by

> (5)(A) not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business of such covered entity; ...

42 U.S.C. § 12112(b)(5)(A).

Under the ADA, an employee begins the accommodation "process" by informing her employer of her disability, which triggers an employer's liability for failure to provide accommodations. *Beck* v. *University of Wis. Bd. of Regents*, 75 F.3d 1130, 1134 (7th Cir. 1996). "Once an employer's responsibility to provide reasonable accommodation is triggered, the employer must engage with the employee in an 'interactive process' to determine the appropriate accommodation under the circumstances." *Bombard* v. *Fort Wayne Newspapers. Inc.*, 92 F.3d 560, 562 (7th Cir. 1996). As our circuit has noted, the ADA's "reasonable accommodation" element imposes a duty upon employers to engage in a flexible, interactive process with the disabled employee needing accommodation so that, together, they might identify the employee's precise limitations and discuss accommodations that might enable the employee to continue working. *Hendricks-Robinson* v. *Excel Corp.*, 154 F.3d *685,* 693 (7th Cir. 1998); *see also* 29 C.F.R. §1630.2(o)(3); 29 C.F.R. Pt. 1630, App. § 1630.9.

However, while the employer "has at least some responsibility in determining the necessary accommodation," the employee likewise must participate meaningfully in determining what specific actions must be taken by the employer. *Beck*, 75 F.3d at 1135. But because neither the ADA nor the EEOC's regulations implementing it assign responsibility for when the interactive process fails, the Seventh Circuit has developed a flexible approach to determine which party is at fault, emphasizing principles of good faith and reasonable effort:

> No hard and fast rule will suffice, because neither party should be able to cause a breakdown in the [interactive) process for the purpose of either avoiding or inflicting liability. Rather, courts should look for signs of failure to participate in good faith or failure by one of the parties to make reasonable efforts to help the other party determine what specific accommodations are necessary. A party that obstructs or delays the interactive process is not acting in good faith. A party that fails to communicate, by way of initiation or response, may also be acting in bad faith. In essence, courts should attempt to isolate the cause of the breakdown and then assign responsibility...
>
> Liability for failure to provide reasonable accommodations ensues only where the employer bears responsibility for the breakdown. But where, as here, the employer does not obstruct the process, but instead makes reasonable efforts both to communicate with the employee and provide accommodations based on the information it possessed, ADA liability simply does not follow.

*Id.* at 1135, 1137.

Salmon's assertion that the School disrupted the interactive process consists of a fanciflil and unsupported contortion of the facts in the record. Salmon claims that she never requested to be transferred (despite considerable evidence to the contrary) and that Smith "never attempted to clarify what [Salmon) needed, how bad her condition was, or how she could continue her job . . ., there was never any

attempt or discussion of accommodating her Junior High and Gifted/Talented assigninent." Pl.'s Resp. at 19-20. The undisputed evidence in the record belies this characterization of the facts.

The interactive process between Smith and Salmon began when Salmon alerted Smith to the fact of her degenerative eye condition on March 6, 1998. Salmon testified in her deposition that she arranged that meeting "to say, 'I have this terrible debilitating condition, degenerative disease, and we need to sit and plan and think what are we going to do with me in the future?' Those were my feelings . . . I tried to get that out the best I could during that meeting." Salmon Dep. at 72. And Salmon succeeded in doing just that, although she now complains that Smith took her too seriously and acted too promptly by reassigning her to a different teaching position for the following academic year that did not involve traveling.

By claiming that she never conveyed to the School that she wanted or needed a transfer, Salmon attempts to avoid summary judgment by placing blame on the School for failing to conceive of a method for her to retain her afternoon elementary classes. Yet, Salmon attempted in her dealings with the School to use her disability as a reason to replace her elementary classes with a full-time position at the junior high school, and she balked when it did not do so, reversing course and claiming during this litigation (for the first time) that she really could have taught those GT elementary classes all along. Essentially, Salmon gambled that reporting her disability would secure her a full-time teaching position at the junior high school, and when that strategy backfired, she turned to the ADA as a method to achieve that objective. Clearly this approach is disingenuous.

Aside from the obvious fact that Salmon, as an equal contributor in the "interactive process," never herself suggested this alternative, the undisputed evidence reveals that she clearly expressed a preference for reassignment to

the junior high school for the following academic year. It does not take much for an employee to activate an employer's potential liability under the ADA, and we can hardly fault the School for promptly heeding Salmon's ominous warning that her "terrible debilitating condition" required accommodation "at some point in the future." *Id.*; *see Hendricks-Robinson*, 154 F.3d at 694 ("A request as straightforward as asking for continued employment is a sufficient request for an accommodation."); *Miller* v. *Illinois Dep't of Corrections*, 107 F.3d 483, 486-87 (7th Cir. 1997) ("Even if an employee who as here becomes disabled while employed just says to the employer, 'I want to keep working for you—do you have any suggestions?' The employer has a duty under the Act to ascertain whether he has some job that the employee might be able to fill.").

Salmon documented her preference to change her afternoon assignment on a number of occasions, a posture at odds with her unsupported position on summary judgment that she never told the School that her disability justified a removal of her GT afternoon classes for the following academic year. During her March 6, 1998, meeting with Superintendent Smith, Salmon declared that her degenerative eye condition, which "wasn't going to get better," made commuting difficult. Salmon Dep. at 63-64. Her own recitation of the content of that meeting, as explained in two separate letters she addressed to the Board and Smith and in her EEOC affidavit, confirmed that her elementary responsibilities "were becoming increasingly hazardous," that her eye condition "put the corporation and myself at risk," and that she had requested a "change in my teaching assignment." In her June 6, 1998, letter to the School Board, she noted that she informed the administration at that March 6 meeting of her "inability to continue commuting to five schools per week." *See* Def.s Ex. 1-I. She also reiterated to the Board that "being placed in an elementary setting could be a perilous action for both students and myself," and that replacing her afternoon elementary classes with classes at the junior high school

"would be the most expeditious solution to my particular situation." Salmon likewise claimed in her letter that during her second meeting with Smith, which occurred in early June, she informed him of the "impropriety of an elementary placement relative to my medical condition." She specifically requested that the Board refrain from transferring her to the elementary setting for the following academic year.

Similarly, Salmon states in her June 15, 1998, letter to Smith that she preferred a junior high school appointment to replace her increasingly hazardous afternoon elementary assignment, again stressing without explanation that her worsening medical condition infused risk of injury into the elementary setting. *See* Def.'s Ex. I -L.

Salmon's responses on the April 1998, "Teacher Survey" also confirmed her willingness to forego teaching afternoon elementary classes for the next academic year. She emphasized that she preferred teaching "at the junior high level" and being placed at "one" building due to her concern about "gradually becoming restricted in my driving." Def.'s Ex. 1-G.

In fact, Salmon's motivation to replace her elementary teaching assignment with a junior high level placement pre-dates her disability, as she requested a junior high position as early as 1989. *See* Pl.'s Resp. at 2. Of course, the School was under no obligation to transfer Salmon to the junior high school setting (back then or now) if it preferred that she teach elementary students, especially considering that the vast majority of her fourteen years of experience accrued at the elementary level. Indeed, Salmon taught morning classes at the junior high school for three years only because her elementary classes at that location were eliminated due to parental complaints about the structure of the OT program; her primary responsibility for the elementary GT program continued in her capacity as the afternoon itinerant GT teacher and coordinator.

We think it is far from coincidental that Salmon happened to time the disclosure of her disability on the eve of the School's allocation of teaching assignments for the following year. Despite the fact that Salmon knew of her condition in May/June 1997, she waited to disclose her condition until March 1998, one month prior to the School's distribution of its annual "Teachers Survey," by which it would gauge personnel and budgetary demands for the following year. Salmon's hesitance to inform the School of her disability finds support in her repeated (and understandable) requests that the School maintain the confidentially of her condition, and the fact that Salmon overcanie her reluctance to divulge such sensitive information highlights the timing of that decision. Perhaps Salmon perceived her condition as having advanced so significantly that she felt a duty to tell the School of the danger involved in her carrying out her afternoon responsibilities, or perhaps her timing related strictly to her desire to obtain a lull-time junior high position. Either way, the result is the same for our purposes: the School acted more than reasonably in fashioning an accommodation for the following school year after Salmon disclosed her condition and conveyed her desire to have her afternoon elementary classes replaced with a junior high assignment.

An application of the principles of good faith and reasonable effort also compels our conclusion that no reasonable jury could find that the School should shoulder the responsibility for the alleged breakdown in the interactive process. Superintendent Smith personally met with Salmon on at least two occasions to discuss her eye condition and a possible accommodation. Salmon and Smith together agreed that a placement that did not involve driving should replace her afternoon GT classes for the following year, which might have included Salmon's teaching high school English to ninth graders. They also exchanged a host of written correspondence detailing their respective positions and proposals on the most appropriate accommodation. Smith even agreed to meet with Salmon's union representatives

after Salmon engaged their assistance, with whom he also exchanged letters regarding Salmon's eye condition and the School's motivations for assigning Salmon to Henryville Elementary. The School's internal processes also reflect its good faith efforts to accommodate Salmon, as the School Board discussed her situation during two consecutive monthly meetings, and Smith elicited the views of each principal who may have been affected by Salmon's transfer. The School continued its accommodation efforts even after it assigned Salmon to Henryville Elementary by providing her with a classroom aide and by exempting her from cafeteria duty, playground supervision and bus duty.

The record establishes that the lines of communication between the parties were wide open, but that Salmon simply did not like what she heard coming from the other end. And while the parties' interactions certainly did not result in an inspired or extensive array of possible accommodations, a lack of ingenuity does not suffice to impose ADA liability for an alleged "breakdown" in the interactive process under these circumstances, especially where Salmon never proposed that she keep her afternoon elementary GT teaching assignment. Based on the evidence before us, the School did not obstruct the interactive process; it communicated with Salmon and provided an accommodation based on her own representations about her disabling condition. While Salmon claims that the School is at fault for allegedly not gathering sufficient medical information about her condition prior to deciding her placement, Salmon had made her preferences abundantly clear to the School authorities more than once.

If any party bears blame for failing to facilitate the exchange of information, it is Salmon, for she showed her medical charts to Smith during their March 6 meeting but refused to provide him with a copy, a decision that had the practical effect of ensuring that the School would rely upon her oral representations about her medical condition. *See* Shireman Dep. at 21-23. Even when Smith provided medical letters from her physicians. Smith attempted to fash-

ion a placement that comported with her physician's medical opinions. Salmon does not explain how the School labored under any misconceptions about her disability or her placement preferences given that they had her own representations about her condition. In short, we find no factual basis to conclude that the School acted in bad faith or that its efforts were sufficiently minimal to impose ADA liability in this case.

Furthermore, Salmon fails to dispute in any convincing fashion the reasonableness of her transfer to Henryville Elementary, aside from her unsupported blanket assertion that she disliked the elementary setting and believed it was "perilous" and risked "injury" to her and her students. See *supra* notes 1&2. As we have previously noted, Salmon never offers a coherent explanation (or any explanation at all for that matter) for why teaching fourth or sixth graders must be more "perilous" than teaching seventh or eighth graders in light of her eye condition. In fact, her own deposition testimony contradicts itself on this hollow assertion. At one point in her deposition, she claims that her eyesight risked bodily harm to herself and her students at the elementary level compared to teaching junior high students. *See* Salmon Dep. at 127-29. At another point she claims that her case has nothing to do with the movement of children or bodily harm, but that her true complaint is that the School's accommodation resulted in her losing morning junior high school classes that she liked to teach. *Id.* at 102-05. Drawn further into the whipsaw of contradiction, Salmon next claims in her Response to the School's summary judgment motion that the "risk of injury" references she makes regarding her teaching of elementary classes do not refer to bodily injury at all. Rather, she claims that her concern about "injury" is primarily a risk of "injury to the learning process." Pl.'s Resp. at 13. Even if this strained interpretation of her own representations is taken as true, it does nothing to explain why her eye disease necessarily heightens the risk of injury to the learning process of elementary students compared to junior high students.

In a continuation of her logical backtrack, Salmon claims in her Response that the School should have fashioned some accommodation for her to keep both the morning schedule and her afternoon elementary classes, instead of transferring her full-time to one elementary school. She then claims that had she not been reassigned to Henryville Elementary, she could have functioned quite effectively in teaching her afternoon GT students if her disability were accommodated in some other, unspecified fashion. That those GT students were fifth-grade *elementary* students, the same level of students that she claimed she could not teach for fear of causing some type of "injury" to herself and her students, makes it plain that Salmon is playing fast and loose with the facts of this case in order to achieve the one (and only one) accommodation she will accept — a full-time teaching position at SCJHS. Indeed, Salmon completes the convolutions of contradiction in her Response, asserting (when attempting to demonstrate that she met the ADA's requirement that she could perform the "essential functions" of elementary teaching) that the "danger" she feared from teaching the elementary students really "had to do with the learning process and her missing feedback from students in her periphery." Pl.'s Resp. at 20. Of course, she offers no supporting evidence or hypothesis explaining how this purported concern, like her purported worry about physical harm, applies to elementary students but not to junior high students. In the end, Salmon utterly fails to impugn the reasonableness of the School's accommodation, and it is not our role to try to conceive arguments for Salmon postulating how peripheral eyesight is more important in one educational setting than another.

Salmon essentially claims that the School is responsible for a breakdown in the interactive process because the School's accommodation resulted in an outcome she did not prefer, to wit, her transfer from the junior high school where she enjoyed teaching. However, it is a well established principle under the ADA that an employee requesting an accommodation is not entitled to the placement of his or her preference. *See Corder* v. *Lucent Tech-*

*nologies. Inc.*, 162 F.3d 924, 928 (7th Cir. 1998) ("The fact that [plaintiff] would have preferred to work full-time in Vernon Hills is of no consequence, for as we have explained, [a]n employer is not obligated to provide an employee with the accommodation he requests or prefers, the employer need only provide some reasonable accommodation.") (internal citations and quotations omitted). As we have said, the School exercised good faith and reasonable efforts to locate a suitable teaching position for Salmon. It was not required to create a part-time afternoon position for Salmon at either the high school or the junior high school, nor was it required to ignore Salmon's candidacy for a fall-time vacancy at the elementary school for the next academic year simply because she had taught morning classes elsewhere in the past. The ADA also does not mandate the School either to "bump" a teacher from the junior high or high school to create a teaching vacancy for Salmon (*Pond* v. *Michelin N. America, Inc.*, __F.3d__, 1999 WL 444633 (7th Cir. June 28, 1999)), or to promote her as an accommodation for her disability. *See Malabarba* v. *Chicago Tribune Co.*, 149 F.3d 690, 699 (7th Cir. 1998). It does not require the best, the most preferred, or even the most obvious accommodation, as long as the accommodation is reasonable:

> An employer is not obligated to provide an employee the accommodation he requests or prefers, the employer need only provide some reasonable accommodation. Thus, when an employee requests a transfer as reasonable accommodation and the employer offers alternative reasonable accommodation, which the employee then refuses, the employer cannot be liable for failing to reasonably accommodate the employee by not transferring him to another position.

*Gile* v. *United Airlines. Inc.*, 95 F.3d 492, 499 (7th Cir. 1996) (internal citation omitted).

Has the interactive process broken down simply because the employer identifies a reasonable accommodation that the employee dislikes? Not under the facts of this case. Having relied upon Salmon's representations that her disability posed considerable challenges to her continued performance of the traveling elementary teaching po-

sition, the School explored the option of transferring her to other teaching positions. Perhaps if Salmon had not set her sights on jettisoning her elementary classes and obtaining a full-time teaching position at the junior high school, she may have been able to suggest options that would have allowed her to continue teaching elementary students in the afternoon and junior high students in the morning, such as possibly the School's hiring of a driver to ease the burden of her five-school commute. *See Webster* v. *Methodist Occupational Health Ctrs., Inc.*, 141 F.3d 1236, 1238 (7th Cir. 1998) ("[Plaintiff] chose the position that was most to her liking... and insisted that [defendant] place her there and nowhere else.... [a)n employee cannot refuse reasonable accommodation during the interactive process that the statute contemplates, and then after dismissal suggest something different and claim that the employer still has a duty to consider further accommodations."). But the parties apparently did not explore that option (or if they did, perhaps determined that it was not viable), and the School devised an assignment that it believed accommodated her disability and at the same time met its staffing needs.

Indeed, Salmon possessed no right to teach morning junior high classes, with or without her disability, and given her insistence on altering her afternoon elementary classes, her morning assignment became fungible in the School's attempt to locate an available teaching assignment for Salmon *(without* having to create another part-time afternoon position).[5] Yet, Salmon claims that since

[5] In a July 23, 1998, letter to Smith, Salmon's union representative, for the first time, raised the possibility of Salmon's teaching part-time (only the morning junior high school classes), contingent upon her receiving a secondary level teaching assignment the following academic year if one became available. Aside from the delinquent manner in which Salmon's union representative raised the possibility (well after Salmon and Smith met and exchanged letters without either party mentioning that alternative and only weeks before the beginning of the 1998-99 school year), that option required the School to prioritize her assignment to her preferred teaching position, an obligation the ADA does not impose. The union representative also did not address the reasonableness of the School's placement of Salmon at Henryville Elementary.

her disability prevented her only from teaching elementary classes, the School should have allowed her to keep her morning classes and created non-elementary classes for her to teach in the afternoon. She contends that because she is not licenced to teach in the high school setting, that leaves her, not surprisingly, with her job of choice — full-time junior high teaching.

We do not regard the School as being so handcuffed in considering its reasonable accommodation options. Salmon's full schedule became subject to change when she expressed a desire to relinquish her responsibility for afternoon elementary teaching. Salmon's availability to teach her morning classes was contingent upon her afternoon schedule, and when her disability altered the latter, it freed the school to consider her entire schedule in fashioning a reasonable accommodation. Salmon had one teaching assignment for the 1997-98 academic year, which consisted of a unique combination of specific morning and afternoon classes, and when Salmon chose to request a realignment of the School's structure of that assignment by requesting a transfer from her afternoon elementary duties, she loosened the moorings to her morning classes as well. Again, nothing in the ADA required the School to create a specially crafted assignment for Salmon, particularly where that accommodation would entail the School's creation of a new afternoon teaching assignment.

Teachers typically have their classes in one building, and Salmon's situation was unusual from the start, as the School fragmented her morning and afternoon elementary classes as part of a unique GT elementary program using the junior high school only as a suitable location. Her responsibilities assumed a hybrid quality when she originally picked up morning junior high classes after parents requested that their elementary children remain in their usual buildings and no longer be taught in the junior high setting. Salmon's teaching responsibilities would become more attenuated from their original elementary purpose if we prevented the School from realigning her morning job responsibilities after she was relieved of her GT elemen-

tary duties (the very reason she found herself at junior high in the first place) because of her disability. Teaching appointments are particularly sensitive to yearly fluctuations in staffing needs and funding allocations, with teachers subjected to annual reassignment, and the Schools vacancy at Henryville Elementary proved its best available option to accommodate Salmon's concerns about her traveling elementary teaching duties. In short, no reasonable trier of fact could conclude on the evidence before us that the School created or was otherwise responsible for the alleged breakdown in the interactive process, as it repeatedly communicated with Salmon in good faith and conceived a reasonable assignment in light of her condition. Accordingly, we GRANT the School's motion for summary judgment on Salmon's failure to accommodate claim.

B. Retaliation

Salmon also alleges that the School retaliated against her for reporting her disability by assigning her to a full-time teaching position at Henryville Elementary School. *See* Pl.'s Resp. at 17. The School rejoins that Salmon's transfer was not an adverse employment action, and that even if Salmon proved a prima facie case of retaliation, its attempt to accommodate Salmon was a legitimate non-retaliatory reason for its actions. We agree and find insufficient evidence in the record for a reasonable jury to hold in Salmon's favor on her retaliation claim.

Retaliation, like other discriminatory actions, may be established either by direct evidence or by the indirect burden shifting method conceived in *McDonnell Douglas Corporation* v. *Green*, 411 U.S. 792, 93 S. Ct. 1817 (1973). *See Stevo* v. *CSX Transp.. Inc.*, No. 97-3974, 1998 WL 516788, at *3 (7th Cir. July 27, 1998). The parties agree that the indirect burden-shifting method applies to Salmon's retaliation claim. *See* PI.'s Resp. at 17; Def.'s Br. Support Summ. J. at 10-11. Under the *McDonnell Douglas* framework, Salmon bears the burden of demonstrating a prima facie case of retaliation, and if she succeeds, the burden of production shifts to the School to come forward with a legitimate, non-retaliatory reason for its actions.[6] *Id.* If the

School produces such a non-retaliatory reason, the burden shifts back to Salmon to demonstrate that the School's proffered reasons for its adverse action were pretextual. *Id.*; *see Steffes* v. *Stepan Co.*, 144 P.3d 1070, 1074 (7th Cir. 1998) (finding that "[t]he elements of a retaliation claim are identical" under the ADA and Title VII). To demonstrate a prima facie case of retaliation under the ADA, Salmon must establish that (1) she engaged in statutorily protected expression; (2) she suffered an adverse action; and (3) there is a causal link between the protected expression and the adverse action. *See Talanda* v. *KFC Nat'l Management Co.*, 140 F.3d 1090, 1095-96 (7th Cir. 1998).

Salmon's retaliation claim fails on at least three distinct grounds. First, as a threshold matter, she comes nowhere close to presenting sufficient evidence for a rational fact-finder to conclude that the School either retaliated or discriminated against her because she is disabled or because she reported her disability. On the contrary, the undisputed evidence indicates that Salmon voluntarily requested that the School reconsider her assignment in light of her disability, and while she did not receive her teaching assignment of choice, the School's attempt to accommodate her vision difficulties cannot be shaded by any fact in the record to establish that it was motivated by a retaliatory animus. *Cf. Doe* v. *Dekalb County Sch. Dist.*, 145 F.3d 1441, 1454 (11th Cir. 1998) ("Of course, a finding that [plaintiff's] transfer was purely voluntary would have been dispositive in the [defendant's] favor; a transfer cannot be 'because of a disability' if it occurred as the result of an

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[6] We note expressly here that we did not utilize this approach in the context of Salmon's reasonable accommodation claim because our circuit has recognized that the *McDonnell Douglas* test is "unnecessary and inappropriate" in reasonable accommodation claims under the ADA. *Hunter* v. *Habegger Corp.*, No. 97-2133, 1998 WL 104635, at *n.5 (7th Cir. Mar. 5, 1998) (internal quotations omitted) (*quoting Bultemeyer* v. *Fort Wayne Community Schs.*, 100 F.3d 1281, 1284 (7th Cir. 1996)); see *Pond*, __F.3d__, 1999 WL 444633, at *5 n.5.

employee's own request."). As we mentioned, the School exercised good faith in responding to Salmon's concerns about her future performance of the traveling elementary position and fashioned a suitable accommodation given Salmon's condition and its staffing needs. The evidence indicates that the School perceived Salmon's teaching abilities glowingly even after she reported her vision difficulties and assigned her to Henryville Elementary because of her qualifications, a perspective inconsistent with Salmon's unsupported contention that the School actually "retaliated" against her for divulging her disability.

Second, Salmon produces no evidence whatsoever to support her subjective opinion that her assignment to Henryville Elementary represented either a demotion or some other form of adverse employment action, a fact that dooms her prima facie retaliation case under the ADA. She also never attempts to assess the impact of her transfer on the "terms, conditions or privileges of [her] employment," which explains the lack of evidence in the record pertaining to the issue. 42 U.S.C. § 12112(a). We fully recognize that our circuit interprets the term "adverse employment action" broadly, and we acknowledge that an employment action may be adverse even if it falls short of outright termination:

> [W]hen an employee is fired, or suffers a reduction in benefits or pay, it is clear that an employee has been the subject of an adverse employment action. But an employment action does not have to be so easily quantified to be considered adverse for our purposes. "[A]dverse job action is not limited solely to loss or reduction of pay or monetary benefits. It can encompass other forms of adversity as well."...
>
> While adverse employment actions extend beyond readily quantifiable losses, not everything that makes an employee unhappy is an actionable adverse action. Otherwise, minor and even trivial employment actions that "an irritable, chip-on-the-shoulder employee did not like would form the basis of a discrimination suit."

*Smart* v. *Ball State Univ.*, 89 F.3d 437, 441 (7th Cir. 1996) (affirming summary judgment on plaintiff's Title VII re-

taliation claim, finding that plaintiff failed to prove that her poor performance evaluations constituted an adverse employment action) (citations omitted).

Hence, an adverse change in the terms and conditions of employment might include termination of employment, a demotion evidenced by a decrease in wage or salary, a less distinguished title, a material loss of benefits, significantly diminished material responsibilities, or other indices that might be unique to a particular situation. *See Crady* v. *Liberty Nat'l Bank & Trust Co. of Indiana*, 993 F.2d 132, 136 (7th Cir. 1993) (affirming summary judgment on plaintiff's ADEA discrimination claim, finding that plaintiff's transfer from an assistant vice president/management position at one bank branch to a loan officer/management position at another branch was not a materially adverse employment action; even though plaintiff's responsibilities changed, he failed to show that his new responsibilities were less significant than his previous duties).

Salmon's only attempt to carry her burden of demonstrating that her transfer was an adverse action is the following, speculative statement: "[A] transfer from a middle to an elementary school might also be thought to involve a significant loss of prestige, and perhaps long-term prospects of advancement as well." Pl.'s Resp. at 19. However, Salmon offers no evidence to substantiate her claim, and the factual record demonstrates quite the opposite in this case. *See Russell* v. *Acme-Evans Co.*, 51 F.3d 64, 69 (7th Cir. 1995) (noting that in assessing a motion for summary judgment, a court assumes that the record at trial would be identical to the record that has been compiled in the summar judgment proceedings).

It certainly is conceivable that an adverse employment action might include a teacher's transfer from one grade to another, such as if a teacher with twenty years of junior high school teaching experience found herself teaching elementary students for the first time. *See Rodriguez* v. *Board of Educ. of Eastchester Union Free Sch. Dist.*, 620 F.2d 362, 366 (2d Cir. 1980) (finding that art teacher's transfer

from junior high to elementary school adversely affected her employment status where the school declined to transfer either of two male art teachers with inferior teaching credentials; teacher, whose Master's and doctoral art degrees focused on junior high level programs, presented "substantially uncontradicted evidence that the art programs at the elementary level were so profoundly different from those in the junior high school as to render utterly useless her twenty years of experience and study in developing art programs for middle school children"). But where, as here, the teacher is transferred to the same level position at which she amassed the majority of her teaching experience, that teacher must exert some effort to demonstrate how the new position materially differs from the old one. Salmon has given us nothing of the sort.

We have no evidence suggesting that Salmon's reassignment was a demotion, that it involved significantly diminished job responsibilities, or that it inhibited her job advancement possibilities or otherwise was perceived in the teaching community as a less distinguished position. Salmon does not claim that the School cut her benefits or salary, or that it reduced her ability to develop lesson plans, to hold parent-teacher conferences or to conduct her classes in the manner she sees fit. All we have before us is Salmon's subjective and otherwise unexplained dislike for a full-time elementary teaching position, despite her years of uninterrupted experience at the elementary level.[7] Salmon's personal outlook on the matter, without more, is insufficient to create a genuine issue of material fact that her transfer was an adverse action. *See Flaherty* v. *Gas Research Inst.*,

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[7] Salmon also never alleges that the School perceived her transfer as a demotion. The evidence suggests the opposite conclusion, as Henryville Elementary's principal (and principals at the junior high and high schools) viewed her quite favorably without regard to her disability, so much so that he intervened during the public School Board meeting (from his seat in the audience) to suggest that she fill the vacancy at his school.

31 F.3d 451, 457 (7th Cir. 1994) (finding that plaintiff failed to show that his transfer from a principal scientist to senior project manager constituted a materially adverse employment action; although the plaintiff's transfer resulted in his reporting to a former subordinate, a "bruised [] ego" represented plaintiff's perception of his transfer and therefore was insufficient to withstand the defendant's motion for summary judgment); *Spring* v. *Sheboyan Area Sch. Dist.*, 865 F.2d 883, 885-86 (7th Cir. 1989) (finding that principal's transfer to a different school where she shared the position with a co-principal was not an adverse employment action even though it subjectively caused her "humiliation," and noting that "public perceptions were not a term or condition of [plaintiff's] employment"); *Doe*, 145 F.3d at 1454; *Garber* v. *New York City Police Dep't*, No. 97-9191, 1998 WL 514222, at *24 (2d Cir. June 12, 1998).

In the absence of any evidence to the contrary, we cannot say that a reasonable jury could find that Salmon's new assignment affected the terms, conditions or privileges of her employment compared to her similar prior experience. Instead, Salmon's elementary assignment, under the facts of this case, is better described as the type of "purely lateral transfer" that does not involve demotion in either form or substance. *See Williams* v. *Bristol-Myers Squibb Co.*, 85 F.3d 270, 274 (7th Cir. 1996) (finding that the involuntary transfer of plaintiff/sales representative from his previous territory to a reorganized territory, which included placement into a disciplinary "coaching" program, his selling a new product line, and at least a temporary reduction in sales commissions did not qualify as a materially adverse employment action); cf. *Dahm* v. *Flynn*, 60 F.3d 253, 257 (7th Cir. 1994) (holding that a shift in job responsibilities may rise to the level of an adverse employment if the plaintiff demonstrates that the new duties entail a "dramatic downward shift in skill level"). Also, apart from the lack of evidence presented by Salmon, common sense does not compel the conclusion that, given Salmon's experience and credentials, teaching fourth or sixth grad-

ers is a demotion or any less challenging or requiring any less skill than her former combination of teaching fifth graders and seventh or eighth graders. *See Ticali* v. *Roman Catholic Diocese of Brooklyn*, 41 F.Supp.2d 249, 264-65 (E.D.N.Y. 1999) (finding that teacher's transfer from the first grade to the pre-kindergarten level was not an adverse employment action).

Any adult who has not learned to read likely would attest to the truth of the district court's holding in *Ticali* noting that the incremental nature of child development makes it difficult to characterize one grade as any more essential than another:

> It is axiomatic that students cannot succeed in subsequent grade levels without first mastering the curriculum of the earlier grades. Pre-kindergarten students have important, if not sophisticated, lessons to ..... . Despite [plaintiff's] disdain for the pre-kindergarten position, she has provided no material evidence that her transfer obligated her to perform tasks that were less appropriate for her skills than her prior position or adverse to her in any other legally cognizable way.

*Id.*

On the other hand, some plaintiffs/teachers have brought discrimination claims against schools alleging that transfers from *lower to higher* grades represent adverse employment actions. *See, e.g., Johnson* v. *Chaffanooga Bd. of Educ.*, No. 90-5593, 1991 WL 24709, at *2 (6th Cir. Feb. 27, 1991) (finding that plaintiff failed to prove that her transfer from the second to the third grade was an adverse employment action; the plaintiff was "not entitled to employment at any particular school or in any particular capacity, so long as any transfer from where she was did not amount to a discharge or 'demotion' "). In the end, neither the facts nor the law save Salmon's retaliation claim where she utterly fails to adduce any evidence that her full-time assignment at Henryville Elementary School was an adverse employment action given her experience and previ-

ous responsibilities. Salmon's inability to demonstrate the adverse action element of her prima facie case simply provides another critical deficiency in her retaliation claim.[8]

Finally, Salmon fails to question the honesty of the School's non-retaliatory reasons for assigning her to Henryville Elementary, even assuming she could succeed in proving her prima facie case. As we recognized previously, the undisputed evidence demonstrates that the School reassigned Salmon's responsibilities in an attempt to accommodate her reported disability, and Salmon produces no evidence even remotely suggesting that the School's stated reason for reassigning her was either pretextual or retaliatory. Once the School investigated possible teaching assignments that did not involve Salmon's traveling, it located a vacancy at Henryville Elementary. Because the School was not obligated to create a position for Salmon, fiscal demands compelled it to select a reasonable accommodation that would avoid unnecessary spending. In other words, financial considerations complemented the School's search for an accommodation, and as long as an employer

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[8] The parties agree that our circuit has properly formulated and analyzed the elements of a prima facie retaliation claim under the ADA, and therefore the propriety of our circuit's approach is not before us. Yet, one commentator has suggested that the "materially adverse/adverse" action element constitutes an improper, judicially-imposed requirement on employment discrimination plaintiffs that the statute's language does not justify. *See* Ernest F. Lidge III, *The Meaning of Discrimination: Why Courts Have Erred in Requiring Employment Discrimination Plaintiffs to Prove That the Employer '5 Action Was Materially Adverse or Ultimate,* 47 U. Kan. L. Rev. 333, 336-39 n.22 (1999) (contending that the Second, Third, Fourth, Fifth. Sixth, Seventh, Eighth, and Ninth Circuits erroneously have created a substantive "adversity" requirement in compelling the plaintiff to prove that an employment action unfavorably affected the terms, condition or privileges of her employment). We leave that issue to another day.

has a non-retaliatory reason for taking an adverse employment action, ADA liability does not attach. *See Russell*, 51 F.3d at 69-70. Despite Salmon's efforts to use the ADA as a vehicle to obtain the full-time junior high teaching assignment that she had unsuccessfully sought while *not* disabled, the evidence demonstrates that the School's accommodation remained true to the ADA's purpose of ensuring that disabled employees enjoy the same "equal employment opportunities" as non-disabled employees. 29 C.F.R. § 1630.19(a). Here, the School's non-retaliatory combination of reasons for assigning Salmon to Henryville Elementary remains unassailed, completely unaddressed by Salmon. Accordingly, we *GRANT* the School's motion for summary judgment on Salmon's retaliation claim.[9]

## Conclusion

For the reasons discussed, we GRANT the School's motion for summary judgment with respect to Salmon's reasonable accommodation claim under the ADA. We also GRANT the School's motion for summary judgment with respect to Salmon's retaliation claim under the ADA.

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[9] At one point in Salmon's Response, she states that it is not "completely correct" to characterize "this as a retaliation claim," although she then proceeds to apply the retaliation framework to this case. Pl.'s Resp. at 17. Instead, she contends without elaboration that "this is more correctly a 'discrimination' case," but she fails to identify or develop in her submissions another "discrimination" theory aside from her failure to accommodate and retaliation claims. *Id.* Also, her EEOC charge includes a failure to accommodate claim only. She never mentions some other form of a disparate treatment claim in her pleadings, for instance, although even if she had and properly included it within the scope of her EEOC charge, that claim would fail for many of the same reasons we have discussed regarding her retaliation claim, such as the School's articulation of a legitimate non-discriminatory reason for her transfer to Henryville Elementary.

It is so ORDERED this 24th day of August 1999.

/s/ Sarah Evans Barker
SARAH EVANS BARKER, CHIEF JUDGE
United States District Court
Southern District of Indiana

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# UNITED STATES DISTRICT COURT
## SOUTHERN DISTRICT OF INDIANA
NEW ALBANY DIVISION

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**No. 98-170-C-B/S**

---

ROBERTA S. SALMON, - - - - - - *Plaintiff,*

*v.*

WEST CLARK COMMUNITY SCHOOLS, - - - - - - - - - - *Defendant.*

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## JUDGMENT

As explained in the accompanying Entry in the above-named cause, judgment is hereby entered in favor of Defendant, West Clark Community Schools, and against Plaintiff, Roberta S. Salmon.

It is so ORDERED this 24th day of August 1999.

/s/ Sarah Evans Barker
SARAH EVANS BARKER, CHIEF JUDGE
United States District Court
Southern District of Indiana

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